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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 750

VINCENT CEFALU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The ruling of the District Court denying the petitioner's motion to dismiss the indictment (Supp. R. 3–6)* is not reported. The *per curiam* opinion of the Court of Appeals affirming the judgment of the District Court is reported at 218 F. 2d 956.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1955, and a petition for

*Record references to the "Original Record Received" are designated "R.". References to the "Supplemental Record" are designated "Supp. R.".

rehearing was denied on March 28, 1955. The petition for a writ of certiorari was filed on April 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether petitioner's motion to dismiss the indictment, on the asserted ground that the Government could not have proved the allegations of the indictment, was erroneously denied.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

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STATEMENT

On February 3, 1953, in the United States District Court for the Eastern District of Louisiana, a four count indictment was filed against the petitioner, charging in counts one and three, the wilful attempted evasion of the petitioner's individual income tax liability for the years 1946 and 1947 and, in counts two and four, the wilful attempted evasion of the income taxes of the petitioner's wife, Frances P. Cefalu, for the same years. (R. 2–4.) The manner of the attempted evasion was alleged to have been the filing of false and fraudulent income tax returns, and the amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count 1 (1946)	$4,150.55	$538.00	$11,048.12	$2,525.37
Count 2 (1946)	4,150.55	538.00	11,048.11	2,525.37
Count 3 (1947)	2,937.18	368.07	9,979.85	2,178.49
Count 4 (1947)	2,937.18	471.37	9,979.85	2,339.99

Petitioner was arraigned on April 8, 1953, and entered a plea of "Not Guilty". (R. 5.)

On the same date, petitioner moved for a bill of particulars (R. 5–10) requesting, among other things, that the court order the Government to describe in detail the net worth statements on the basis of which the indictment figures were computed (R. 9). Pursuant to the court's order

(R. 11), the Government filed a bill of particulars setting forth in detail the comparative net worth computations upon which the indictment figures were based (R. 11–14).

Thereafter, petitioner filed a "Motion for a Better Bill of Particulars," praying that the Government be required to show which of the statements on the income tax returns of the petitioner and his wife were alleged to be false and to supply a more detailed list of assets and liabilities included in the Government's net worth computations, together with the valuation placed on each particular asset or liability item. (R. 15–17.) The court granted this motion to the extent of requiring the Government to show the approximate number of coin-operated machines used in determining the petitioner's net worth. (R. 18–19.) The Government filed an answer setting forth the number of the various types of machines acquired by the petitioner during each of the years 1946 and 1947, and stating that the net cost of the machines acquired corresponded to the increases in this particular type of asset item shown on the net worth schedule previously furnished. (R. 19–20.)

Again the petitioner moved the court to order the Government to furnish particulars, and requested that the Government be ordered to show the approximate number of machines held by the petitioner at the beginning of 1946, 1947 and 1948. (R. 21–24.) This motion was granted (R.

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25–26), and an amended bill of particulars was filed, stating that the Government was unable to prove the number of such machines at the beginning of each such calendar year (R. 27–29).

Petitioner then moved to dismiss the indictment on the ground that "it would be impossible for the Government on trial of this case to prove beyond and to the exclusion of a reasonable doubt the beginning and ending net worth of the defendant as of the calendar years, 1946 and 1947." (R. 29–33.) This motion was denied, the court pointing out that the Government had stated that it would show the value of the machines ($11,000) at the beginning of the prosecution period (December 31, 1945), and that the offenses charged could be established without showing the precise number of such machines. (R. 34, Supp. R. 2–6.) Thereupon, a plea of *nolo contendere* was offered and accepted. (R. 34.)

Judgment of guilty was entered by the trial court on January 20, 1954, and the petitioner was sentenced to a term of imprisonment of 181 days and fined $2,000. (R. 35.) The Court of Appeals affirmed *per curiam*.

ARGUMENT

Although his plea of *nolo contendere* was "an admission of guilt" leaving open for review only the sufficiency of the indictment (*Hudson* v. *United States*, 272 U. S. 451, 455; *United Brotherhood of Carpenters* v. *United States*, 330 U. S.

395, 412; *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 296), petitioner argues that the indictment should have been dismissed because the Government could not have proved its case. Even assuming that the *nolo contendere* plea leaves any basis for such a contention, petitioner's claim rests upon a readily corrected misconception of the record and is without merit.

The Government stated in its bill of particulars that it could not establish the *number* of coin-operated machines petitioner had on hand at the end of 1945, 1946, and 1947. (R. 29.) But the Government showed the *value* in money of such machines for these dates. (R. 12, 28.) Thus, petitioner is mistaken in his assertion (Pet. 9–10) that the Government acknowledged an inability to "show an accurate beginning and ending net worth statement for the years in question." Obviously, it would have been ample for the Government to prove the dollar value of these assets for the dates in question to establish the pertinent increases in petitioner's net worth.

We note, moreover, that petitioner's plea of *nolo contendere* forecloses the kind of inquiry he proposes into whether the Government could have proved his guilt. Though he attempts to formulate his argument as an attack upon the sufficiency of the indictment, it is clear that the indictment was a valid one and that the facts his plea admitted constituted the offense for which he was convicted. Petitioner made no effort to

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withdraw his plea. There was no basis for his attempt to litigate the issue of guilt that plea concluded. *United States* v. *Norris,* 281 U. S. 619.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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